313

No. 1023

FILED
MAY 5 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Duly Authorized Representative of JAMES FOSTER and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit,

and

BRIEF IN SUPPORT THEREOF.

CHAS. M. HAY and
S. D. FLANAGAN,
506 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Petition for a writ of certiorari	1-17
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the facts and the matter involved	5
Specification of errors to be urged	11
Reasons for granting the writ	12
Conclusion	17
Brief in support of petition for certiorari	18-37
Opinions of the courts below	18
Statement of the case	18
Specification of errors to be urged	18
Summary of the argument	18
Argument	21
I. Tips received by the redcaps from persons using respondent's depot were gifts or gratuities to them, and were their property in the absence of an agreement to the contrary	21
II. The Fair Labor Standards Act did not affect the ownership of the tips so as to make them the property of respondent	23
III. Under the arrangement existing when respondent's notice of October 22, 1938, was served on the redcaps, they had the right to retain all tips received. This arrangement was never changed despite respondent's notice	25

IV. Respondent by its notice of October 22, 1938, did not claim ownership of the redcaps' tips. The notice was merely an assertion by respondent of its opinion that tips were wages under the Fair Labor Standards Act, and that it was only bound to make up the difference between the tips received and the minimum wages earned 31

V. The accounting and guarantee plan is not a compliance with the Fair Labor Standards Act, because it does not carry out the purposes of Congress since (a) it permits of easy evasion of the obligations imposed thereby, (b) it shifts the burden of keeping records from the employer to the employee in violation of section 11 (c) of the act, and (c) it is conducive to labor disputes burdening and obstructing commerce 33

VI. Tips received by the redcaps were not payment of wages by respondent as required by the Fair Labor Standards Act. The judgment of the Circuit Court of Appeals reversing the judgment of the District Court in favor of the redcaps is, therefore, erroneous..... 36

CITATIONS.

Cases.

Albert and J. M. Anderson Manufacturing Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778 36

Booker v. Pennsylvania Railroad, 82 Pa. Super. 588... 22

Harrison etc. v. Kansas City Terminal Railway Company, 36 F. Supp. 434, l. c. 439 (8).....13, 21, 36

McRae v. McBeath, 5 N. B. 446..... 22

Polites v. Barlin (1912), 149 Ky. 376, 41 L. R. A. (n. s.) 1217, 149 S. W. 828 22
Powers' Case, 275 Mass. 515, 176 N. E. 621 23
Russell Motor Car Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778 36
Smythe v. Fiske, 23 Wall. 374, 380, 23 Law. Ed. 47, 49 .. 30
United States v. Missouri Pacific Railroad Company, 49 Sup. Ct. 133, 278 U. S. 269, 72 L. Ed. 322 .....35, 36
Virginian Railway Company v. System Federation, No. 40, 300 U. S. 515, 81 L. Ed. 789 27
Zappas v. Roumeliote, 156 Iowa 709, 137 N. W. 935 ... 22

Statutes.

Fair Labor Standards Act of 1938, c. 676, secs. 3 (m), 6 (a), 11 (c), 52 Stat. 1060, U. S. C. A., Title 29 .....3, 11, 12, 33
Judicial Code, Sec. 240, as amended by Act of Feb. 13, 1925, 43 Stats. 938, U. S. C. A., Title 28, Sec. 347..... 2
Railway Labor Act, as amended, c. 347, secs. 203 (m), 206 (a), 211 (c), sec. 2 (44 Stat. 577, as amended June 21, 1934, c. 691; sec. 2, 48 Stat. 1186, U. S. C. A., Title 45, sec. 152).....3, 4, 11, 26, 27, 29

Miscellaneous.

13 A. L. R. 921 (note)..... 22

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Duly Authorized Representative of JAMES FOSTER and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit.

A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, duly authorized representative of James Foster, and others, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on March 4, 1941, reversing a judgment of the District Court of the United States within and for the Dallas Division of the Northern Judicial District of Texas in favor of your petitioner and against respondent herein.

OPINIONS BELOW.

The oral opinion, findings of fact, conclusions of law, and written opinion of the District Court of the United States for the Dallas Division of the Northern Judicial District of Texas may be found at R. 276-290. The written opinion of said District Court is reported in 33 F. Supp. 244.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit may be found at R. 301-303, and is reported in 118 F. (2d) 328.

JURISDICTION.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, U. S. C. A., Title 28, Section 347. The judgment of the United States Circuit Court of Appeals for the Fifth Circuit sought to be reviewed was entered March 4, 1941 (R. 304). A petition for a rehearing was filed March 24, 1941, within the time provided by the rules of said Circuit Court of Appeals (R. 305), and the petition for a rehearing was denied April 2, 1941 (R. 310).

QUESTIONS PRESENTED.

1. Whether in a case where employees of a railroad company subject to the Railway Labor Act have organized, and by a majority vote have elected and designated a representative for collective bargaining purposes, and have so informed their employer, and have requested a conference for the purpose of making an agreement with respect to wages and working conditions, the employer may without first exerting every reasonable effort to make an agreement covering rates of pay, rules and working conditions, as required by Sec. 2 of the Railway Labor Act, and by unilateral action by notice served on the employees indi-

vidually, and over their protest, effect a change in their working conditions.

2. Whether under the circumstances related in the preceding question, a railroad company employing redcaps at its terminal under an arrangement by which it pays them no wages, but permits them to retain all tips received, has complied with Section 6 of the Fair Labor Standards Act of 1938, where it has served a notice on the redcaps,, against which they protest, and to which they at no time consent, that commencing with the effective date of said act they will be required to report daily all tips received, and that the company guarantees to each redcap continuing in service compensation which, together with the tips received, will not be less than the minimum wage provided by law, and that the redcaps are privileged to retain, subject to there being credited on such guarantee, all tips received, except such portion thereof as may be required to pay taxes imposed upon the redcaps and collectible by the company.

STATUTES INVOLVED.

The statutes involved are Sections 3 (m), 6 (a) and 11 (c) of the Fair Labor Standards Act of 1938, c. 676; Sections 3 (m), 6 (a) and 11 (c), 52 Stat. 1060, U. S. C. A., Title 29; Sections 203 (m), 206 (a) and 211 (c), and Section 2 of the Railway Labor Act, as amended, c. 347; Section 2, 44 Stat. 577, as amended June 21, 1934, c. 691; Section 2, 48 Stat. 1186, U. S. C. A., Title 45, Section 152.

The provisions of the Fair Labor Standards Act of 1938 primarily involved are:

> Section 3. As used in this chapter—
>
> * * * * * * *
>
> (m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator,

to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

Section 6.

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour.

(2) during the next six years from such date, not less than 30 cents an hour.

Section 11.

* * * * * *

(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

The provisions of the Railway Labor Act primarily involved are:

Section 2. First. Duty of carriers and employees to settle disputes.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any

carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

STATEMENT OF THE FACTS AND THE MATTER INVOLVED.

This suit was instituted by petitioner, who had been duly designated as agent and representative of certain redcap employees of the respondent at its passenger terminal in Dallas, Texas, as their agent and representative pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, by filing a complaint in the District Court of the United States for the Dallas Division of the Northern Judicial District of Texas, to recover for said redcaps unpaid minimum wages alleged to be due them under Section 6 (a) of said Act, together with an equal amount as liquidated damages and attorney's fees.

For more than thirteen years said redcaps had been employed by respondent, receiving no wages, but depending solely on tips or gratuities of passengers whom they served. On September 29, 1938, the Interstate Commerce Commission acting under authority conferred upon it by Section 1, Fifth, of the Railway Labor Act, in a proceeding before it known as Ex Parte 72 (Sub. No. 1), held that redcaps at stations and cities of over one hundred thousand population were employees for the purposes of the Railway Labor Act (R. 195). Thereafter, on October 11, 1938, all of the redcaps involved in this action, constituting almost all the redcap employees of respondent, and

a majority of said employees, executed and delivered to respondent an instrument (R. 139-141) whereby they designated the Union Terminal System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as their duly authorized and accredited representative for the purposes of the Railway Labor Act, and authorized said organization to enter into negotiations with respondent for the purpose of making a working agreement covering their conditions of employment, and to do all other things in connection therewith having for its purpose the making and maintaining of an agreement between respondent and said redcaps. On the same date plaintiff herein, who is General Chairman of said Union Terminal System Board of Adjustment, wrote respondent's vice-president and general manager (R. 142-143) advising him of the ruling of the Interstate Commerce Commission holding that redcaps were employees for the purposes of the Railway Labor Act, and of the fact that the redcaps had authorized the Union Terminal System Board of Adjustment to represent them in the making of a working agreement as contemplated by the Railway Labor Act, and that they were, therefore, serving notice upon respondent of the action of the employees, and were advising the respondent that they were prepared to exihibit to it the authorizations that were executed by the redcaps, and were asking for a conference under the terms of the Railway Labor Act for the following purposes: (1) to exhibit to respondent the authorizations executed by the employees authorizing said board of adjustment to act for the redcaps, and (2) for the purpose of negotiating an agreement covering their working conditions and other related subjects. This letter concluded with a request that petitioner be advised of the time, date and place that would be agreeable to respondent to hold a conference for the aforesaid purposes.

Respondent did not answer this letter of petitioner, but on October 22, 1938, served upon each redcap employed by it a notice (R. 127) informing him that in view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of his thereafter engaging in the handling of hand baggage of passengers or otherwise assisting them, it would be necessary that he report daily to respondent the amount received by him as tips or remuneration for such services, and that respondent guaranteed to each person continuing such service after said date compensation which, together with and including the sums of money received as above stated, would not be less than the minimum wage provided by law, and that he was privileged to retain, subject to their being credited on such guarantee, all such tips or remuneration received by him except such portion thereof as might be required of him by respondent for taxes of any character imposed upon him by law and collectible by respondent.

The redcaps did not reply individually to this notice, but petitioner, as their representative, wrote a letter to respondent's vice-president and general manager October 24, 1938 (R. 128), protesting against the arrangement sought to be imposed by respondent set forth in the notice of October 22, 1938. Thereafter petitioner and respondent's general manager conferred with a view of negotiating a working agreement covering the redcaps employed by respondent. During the period covered by these conferences respondent's vice-president, under date of December 6, 1939, wrote a letter (R. 153) to petitioner referring to a proposed agreement and stating "as I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day is in the Court, and as soon as same is decided, we will be glad to negotiate an agreement with the Clerks' Union of which you are the general chairman for the company." A work-

ing agreement was finally entered into between respondent and the Brotherhood of Railway and Steamship Clerks, effective January 1, 1940, rule 16 of which (R. 134) provided that if a redcap was improperly suspended or dismissed, and after a hearing was reinstated, he should be reimbursed for any money losses suffered, provided that it was subsequently determined that under the provisions of the Fair Labor Standards Act the carrier was required to pay a wage to the redcap over and above any amounts that might be received by him as tips. Testimony was introduced to the effect that from October 22, 1938, to the date of the trial, the redcaps at no time withdrew their protest against the arrangement described in respondent's notice of October 22, 1938 (R. 199 and 206).

During the period from October 24, 1938, to February 28, 1939, each of the redcaps reported daily on a form furnished by respondent the amount of tips he had received, and respondent twice each month paid, in every case where the tips reported did not equal the minimum wage provided by the Fair Labor Standards Act, the difference between the tips reported and the minimum wages earned during the preceding half month. During the period from March 1st to October 15th, 1939, the redcaps, pursuant to instructions of respondent, did not report their tips, but respondent advised them that it would assume, unless reported to the contrary, that for each work period after February 28, 1939, each redcap collected in tips at least an amount equivalent to the number of hours worked multiplied by 25 cents, and that should any redcap receive less than said amount during any work period, he should report it to respondent, and respondent would pay any difference between the amount of tips collected and the amount produced by multiplying the number of hours worked by 25 cents, and that each of said redcaps should fill in a form showing the hours worked during the day

for each day worked. It was agreed that during this period each redcap collected in tips during each work period an amount equal to or in excess of the number of hours worked during the work period multiplied by 25 cents. From October 16, 1939, to March 6, 1940, the day preceding the filing of this suit, each red cap reported daily the tips he received, and where the tips received during any work period were less than the minimum wages earned, defendant paid the difference between the tips and the minimum wages.

Judgment was entered by the District Court in favor of petitioner and against respondent (R. 39-41) for unpaid minimum wages in the sum of $38,626.99, liquidated damages in an equal amount, and attorney's fees in the sum of $500.00, totaling $77,753.98. The District Court based its decision on the grounds that the payment of tips by the public to the employee of another was a gift to that employee, and in the absence of any contract between the employee and employer that such tips should be the property of the employer, they remained the property of the employee, and that a gratuity paid by the public to the employee of an employer cannot be a compliance with a plainly worded statute which requires the employer to pay the employee a certain sum. The Court referred to petitioner's letter to respondent's vice-president and general manager, dated October 24, 1938, the letter of this official dated December 6, 1939, and rule 16 of the working agreement of January 1, 1940, and held that under these circumstances there was no meeting of the minds of the parties on the terms of respondent's notice of October 22, 1938, and that consequently, the notice did not effect any change in the existing arrangement between the parties; that, therefore, the tips remained the property of the redcaps, and could not be considered payment of wages by respondent (R. 286-290).

The Circuit Court of Appeals for the Fifth Circuit in a majority opinion written by Judge Sibley and concurred in by Judge Foster (R. 301) followed its opinion in the case of Williams v. Jacksonville Terminal Company, 118 F. (2) 324, decided by it the same day, and reversed the judgment of the District Court, and remanded the cause for further consistent proceedings (R. 304). The Court reasoned that it did not appear that the moneys collected by the redcaps were personal gifts and not compensation for the service which respondent hired them to perform, and that no contract was necessary to make the tips the money of the company; that although they did not agree to the plan stated in respondent's notice of October 22, 1938, they did continue to work and collected money for their services and accounted for it as required, and that the law intervened to make respondent owe them a stated wage for those services, and in consequence, to deprive them of the tips which previously were their compensation. The Court held that petitioner's argument that the former arrangement, though not a formal collective agreement, ought to be held unchangeable by the employer alone, could not be sustained; both because there was no collective agreement that the tips should belong to the redcaps, and because a collective agreement would not avail against changes wrought by a statute.

Judge Holmes, dissenting, held that the word "tip" should be given its usual and ordinary meaning, and that if what the redcaps received were gifts or gratuities, they had the right to keep them for themselves, and that if Congress had intended that tips should be included in the meaning of the word "wages" it would have said so.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that the tips received by the redcaps were not personal gifts to the redcaps, but were compensation for services which respondent hired them to perform, so that no contract was necessary to make the tips the property of respondent.

2. In holding that the Fair Labor Standards Act had intervened to make respondent owe the redcaps a stated wage, and in consequence to deprive them of the tips which the Court said were previously their compensation.

3. In holding that even though a majority of the redcaps had designated a representative under the Railway Labor Act for collective bargaining purposes, and a conference had been requested of respondent by said representative to negotiate a working agreement for said redcaps, respondent by unilateral action on its part and without exerting every reasonable effort, as required by Section 2 of the Railway Labor Act, to make an agreement with the redcaps, could effect a change in the existing arrangement under which the tips belonged to the redcaps so as to appropriate said tips for the payment of the minimum wage.

4. In holding that respondent's notice to the redcaps was sufficient to make the tips received by them the money of respondent, as said notice did not claim ownership of the tips, but merely offered to pay any difference between the minimum wages and the tips received on the theory that tips were wages under the Fair Labor Standards Act.

5. In holding that the accounting and guarantee plan was a compliance with the Fair Labor Standards Act because the plan will not carry out the purposes of Congress,

since it permits of easy evasion of the obligations imposed thereby, shifts the burden of keeping records from the employer to the employee, although Section 11 (c) of the Act requires the employer to keep records necessary to show compliance with the act, and is conducive to labor disputes burdening and obstructing commerce.

6. In failing to hold that in the absence of an agreement to the contrary, tips received by the redcaps were their property, and were not under the Fair Labor Standards Act wages paid by respondent, and that there was no agreement between the parties that the tips should be the property of respondent, and hence judgment in favor of petitioner should have been affirmed.

REASONS FOR GRANTING THE WRIT.

I.

Petitioner submits that this Court should issue its writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit because said Court has decided important questions of federal law which have not been, but should be, settled by this Court, these questions being heretofore set forth under "Questions Presented" on page 2 of this petition. The determination of these questions involves the construction of two important federal statutes, the Fair Labor Standards Act of 1938 and the Railway Labor Act.

The determination of these questions by this Court is of great public importance, in order that this Court may set at rest much doubt, avoid a multiplicity of suits, and furnish the Administrator of the Fair Labor Standards Act, and employers and employees in tipping occupations subject to the act, with a certain guide so that they may comply with the act.

The present suit is only one of many now pending in

various District Courts of the United States in which similar questions have been raised as to whether tips received by redcaps and reported to their employers under the accounting and guarantee plan may be considered payment of wages by their employers under that act. Your petitioner has knowledge of the following cases pending and awaiting trial in District Courts of the United States: Eugene Frazier et al. v. The Cleveland Union Terminals Co., Northern District of Ohio, Eastern Division; Willard Saxby Townsend et al. v. Boston & Maine Railroad, District of Massachusetts; Willard Saxby Townsend et al. v. H. S. Palmer, M. M. Daniels and J. L. Loomis, as Trustees of the New York, New Haven & Hartford Railroad Co., District of Massachusetts; Willard Saxby Townsend v. The Cincinnati Union Terminal Co., Inc., Southern District of Ohio, Western Division; Willard Saxby Townsend et al. v. The Indianapolis Union Railway Co., Southern District of Indiana, Indianapolis Division; Willard Saxby Townsend v. The Union Depot Company, Southern District of Ohio, Eastern Division; Willard Saxby Townsend et al. v. Tulsa Union Depot Co., Northern District of Oklahoma; Willard Saxby Townsend et al. v. The Washington Terminal Company, District of Columbia; William D. Ryan etc. v. The Denver Union Terminal Company, District of Colorado. The case of Willard Saxby Townsend et al. v. The New York Central Railroad Company et al. has been tried and submitted to the District Court of the United States for the Northern District of Illinois, Eastern Division. Three other cases have been tried, one being George M. Harrison etc. v. Terminal Railroad Association of St. Louis, decided in favor of defendant, and which will be appealed to the United States Circuit Court of Appeals for the Eighth Circuit, and the case of George M. Harrison etc. v. Kansas City Terminal Railway Company, 36 F. Supp. 434, which has been decided in favor of defendant, and ap-

pealed to the United States Circuit Court of Appeals for the Eighth Circuit. Another case, James E. Taylor et al. v. Pennsylvania-Reading Seashore Lines, Inc., was decided April 19, 1941, in favor of the defendant, and if appealed, will go to the United States Circuit Court of Appeals for the Third Circuit. Thus it appears that cases similar to the case at bar involving a construction of the same sections of the Fair Labor Standards Act construed by the United States Circuit Court of Appeals for the Fifth Circuit will likely be submitted to the United States Circuit Courts of Appeal for the First, Third, Sixth, Seventh and Eighth Circuits. An authoritative decision by this Court of the questions involved in the construction of the Fair Labor Standards Act will likely dispose of most of these cases, or if not, will be of great value to these courts in reaching a correct decision.

The fact that the question involved here, as to whether an employer may comply with the Fair Labor Standards Act by paying only the difference between tips reported by his employees and the minimum wage under an accounting and guarantee plan, is of great public importance, is evidenced by the fact that the Administrator of the Fair Labor Standards Act has seen fit to institute two suits under section 17 of the act for injunctions against terminal companies to enjoin them from continuing with the plan, one of these cases being Philip B. Fleming, as Administrator of the Wage and Hour Division, United States Department of Labor, v. Cincinnati Union Terminal Company, Inc., and the other being a similar action against the Cleveland Union Terminal Company. After the filing of the case against the Cincinnati Union Terminal Company, the company abandoned the accounting and guarantee plan, and on its contention that the case thereby became moot, it was dismissed by the District Court. The decree of the District Court was, however, reversed and the case remanded for

further proceedings by the Circuit Court of Appeals of the Sixth Circuit, 117 F. (2d) 1012. Further evidence of the great public importance of the questions involved is the fact that the Administrator of the Fair Labor Standards Act filed briefs as amicus curiae in the case at bar, in the case of Williams et al. v. Jacksonville Terminal Company, heard and decided contemporaneously with this case by the Circuit Court of Appeals for the Fifth Circuit, and in other cases, including the cases at St. Louis, Kansas City and Chicago.

The filing of the case by the Administrator against the Cincinnati Union Terminal Company followed the adoption by him of the recommendations made by Gustav Peck, Assistant Chief of the Hearings and Exemptions Section of the Wage and Hour Division, who conducted a hearing on June 27th and 28th, 1939, on the record-keeping practices used by railroads and terminals in the employment of redcaps. Mr. Peck in his report, adopted by the Administrator, found that the pay-roll records of the railroads for redcaps generally did not accurately record the data as to wages paid, and he stated that it appeared that there was grave legal doubt as to the validity under the Fair Labor Standards Act of the accounting and guarantee arrangement which the carriers were using, and recommended that the Wage and Hour Division take immediate steps through court action to determine the validity of the arrangement (1941 CCH Labor Law Service, Section 33208, 4 Fed. Reg. 4252).

The decision of the Circuit Court of Appeals in this case, if permitted to stand, will have far-reaching effect, for it will approve a means and method which not only railroads may adopt as to their redcap employees, but which any employer in tipping occupations may adopt to evade the plain terms of the statute requiring every employer to pay each of his employees within the act wages at the specified

rates. We believe this explains the unusual interest which the Administrator of the Fair Labor Standards Act has taken in these cases.

In his brief annexed hereto petitioner has set forth reasons why he believes the Circuit Court of Appeals erred in its decision, and will not reiterate his criticism of the decision here, except to point out that the unusual effect ascribed to the Fair Labor Standards Act of ipso facto changing the ownership of tips from the redcaps to the respondent, and the Court's statement that even though there was a collective agreement that the tips should belong to the redcaps, this "collective agreement would not avail against changes wrought by a statute" are so startling as to call for the exercise by this Court of its discretionary power to review the decision of the Circuit Court of Appeals to the end that if said Court erred, the error may be corrected.

II.

Petitioner respectfully submits that this Court should issue its writ of certiorari herein for the further reason that another important question of federal law which has not been, but should be, settled by this Court, was decided by the Circuit Court of Appeals, that is, whether a railroad company subject to the Railway Labor Act, after its employees have organized and designated a representative for collective bargaining purposes, and said representative has requested a conference for the purpose of making an agreement with respect to wages and working conditions, can by unilateral action on its part, and without first asserting every reasonable effort to make an agreement covering said employees, change their working conditions over their protest.

The authoritative settlement of this question by this Court is of great public importance as the construction

of the Railway Labor Act, an important federal statute governing the relation of the nation's railroads and their employees, is involved. Section 2 of the Railway Labor Act imposes the duty on both the carriers and their employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. Such arbitrary conduct as respondent was guilty of in this case is not conducive to harmonious relations between carriers and their employees, and is, as we shall more fully point out in our brief in support of this petition, contrary to both the letter and spirit of the Railway Labor Act. Petitioner respectfully submits that this Court should settle this question of the construction of the Railway Labor Act so that both employers and employees subject thereto may definitely know their rights and liabilities thereunder.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

CHAS. M. HAY and
S. D. FLANAGAN,
Attorneys for Petitioner.

May, 1941.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The oral opinion, findings of fact, conclusions of law and written opinion of the District Court of the United States for the Dallas Division of the Northern Judicial District of Texas may be found at R. 276-290. The written opinion of said District Court is reported in 33 F. Supp. 244.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit may be found at R. 301-303, and is reported in 118 F. (2d) 328.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in the petition for certiorari, and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

SPECIFICATION OF ERRORS TO BE URGED.

The errors to be urged are set forth in the petition for certiorari, and for the sake of brevity are not repeated here.

SUMMARY OF THE ARGUMENT.

I.

Tips received by the redcaps from persons using respondent's depot were gifts or gratuities to them, and were their property in the absence of an agreement to the contrary.

II.

The Fair Labor Standards Act did not affect the ownership of the tips so as to make them the property of respondent.

III.

Under the arrangement existing when respondent's notice of October 22, 1938, was served on the redcaps, they had the right to retain all tips received. This arrangement was never changed despite respondent's notice because (a) the redcaps did not accept the plan, but, on the contrary, protested against it, and the parties by their conduct thereafter recognized that there had never been a meeting of the minds thereon, and (b) respondent could not by its unilateral action effect a change in the arrangement in view of the redcaps previous designation of a representative for collective bargaining purposes, and request for a conference to negotiate a collective agreement under the Railway Labor Act.

IV.

Respondent by its notice of October 22, 1938, did not claim ownership of the redcaps' tips. The notice was merely an assertion by respondent of its opinion that tips were wages under the Fair Labor Standards Act, and that it was only bound to make up the difference between the tips received and the minimum wages earned.

V.

The accounting and guarantee plan is not a compliance with the Fair Labor Standards Act because it does not carry out the purposes of Congress since (a) it permits of easy evasion of the obligations imposed thereby, (b) it shifts the burden of keeping records from the employer to

the employee in violation of Section 11 (c) of the Act, and (c) it is conducive to labor disputes burdening and obstructing commerce.

VI.

Tips received by the redcaps were not payment of wages by defendant as required by the Fair Labor Standards Act. The judgment of the Circuit Court of Appeals reversing the judgment of the District Court in favor of the redcaps is, therefore, erroneous.

ARGUMENT.

I.

Tips Received by the Redcaps From Persons Using Respondent's Depot Were Gifts or Gratuities to Them, and Were Their Property in the Absence of an Agreement to the Contrary.

The Circuit Court of Appeals for the Fifth Circuit based its decision on its conclusion that the tips received by the redcaps after October 24, 1938, the effective date of the Fair Labor Standards Act, were the property of respondent, and hence, the retention by the redcaps of these tips—the respondent's property—was payment of wages by respondent. Judge Holmes in his dissenting opinions in this case and the Jacksonville case held, in effect, that the word "tip" should be given its usual and ordinary meaning, that of a gift or gratuity, and that being gifts or gratuities the redcaps had the right to retain the tips for themselves. He was of the opinion that tips were not compensation for service, but rather gifts or gratuities, because whatever moral compulsion one may have been under to tip redcaps, Pullman porters or other employees, there was no legal obligation to do so during the period involved. He agreed with District Judge Atwell, who said (R. 286), 33 F. Supp. 247:

> "The payment of tips by the public, to the employee of another, is a gift to that employee, and in the absence of any contract between the employee and employer that such tips shall be the property of the employer, they remain the property of the employee."

Judge Otis in the case of Harrison etc. v. Kansas City Terminal Railway Company, 36 F. Supp. 434, l. c. 439 (8), held likewise. The dissenting opinion of Judge Holmes, the opinion of Judge Atwell, and the opinion of Judge

Otis follow the only previously reported cases which hold that in the absence of an agreement, tips given by customers to an employee belong to the employee. These previous cases cited in a note in 13 A. L. R. 921 are Polites v. Barlin (1912), 149 Ky. 376, 41 L. R. A. (n. s.) 1217, 149 S. W. 828; Zappas v. Roumeliote, 156 Iowa 709, 137 N. W. 935, and McRae v. McBeath, 5 N. B. 446. Much doubt is cast on the correctness of the majority opinion in this case in view of its conflict with the previously decided cases holding that tips are the property of an employee in the absence of a contrary agreement.

The majority opinion proceeds on the theory that since the tips would not have been given the redcaps unless they performed a service for the donor, the tips are essentially compensation for services rendered by respondent through the redcaps, and not gifts, and hence are the property of the respondent. Judge Holmes, dissenting, however, takes the position that the tips were gifts, since there was no legal obligation to tip at all. The majority opinion ignores the fact that in the case of every gift, there is in a non-legal sense a legal consideration, that is, a reason for its being made, whether it be love, affection, a past favor, or a desire on the part of the donor to favor the donee, but it is the absence of a **legal** consideration which the courts have in mind when they say a gift implies want of consideration. The courts have held that a tip is a gift or gratuity not founded on any legal consideration. Thus, in Booker v. Pennsylvania Railroad, 82 Pa. Super. 588, the Court said:

> "The money paid by the passenger was not compensation which the porter could have demanded or sued for in an action, but was rather a gratuity or tip which he was not bound to give, and which the porter could not have recovered in an action of assumpsit if the passenger had not seen fit to give it."

And in Powers' Case, 275 Mass. 515, 176 N. E. 621, the Court said:

> "As to each customer of the employer, the tip to the employee was a gift and not founded on an obligation."

Petitioner respectfully submits, therefore, that the Circuit Court of Appeals erred when it held that tips were not gifts or gratuities to the redcaps, and that since they were such, the tips were the property of the redcaps in accordance with the intention of the donors.

II.

The Fair Labor Standards Act Did Not Affect the Ownership of the Tips So as to Make Them the Property of Respondent.

Judge Sibley, writing the majority opinion of the Circuit Court of Appeals, avoids the accounting and guarantee notice almost entirely. We believe he did so because after admitting that the tips belonged to the redcaps before October 24, 1938, if he should base respondent's title to the tips on the notice, he would have to find some act of the redcaps by which they agreed to transfer the tips from themselves to respondent. This he apparently could not do in view of the trial court's finding that there was no meeting of the minds of the parties on the terms of the notice (33 F. Supp. 244, l. c. 248). He, therefore, found it necessary to rest his decision solely on the effect of the Fair Labor Standards Act itself, and not on any consent of the redcaps. He, therefore, said (R. 302), 118 F. (2d) 328:

> "The law had intervened to make the company owe them a stated wage for those services, and in consequence, to deprive them of the tips which previously

were their compensation. * * * a collective agreement would not avail against changes wrought by a statute."

There is no basis for this holding of the Court in any provision of the Fair Labor Standards Act. The act does not deal with the subject of tips. It merely requires every employer subject to the act to pay each of his employees wages at the minimum rates, and certainly Congress had no intention to affect any existing arrangement between employer and employees with respect to the ownership of tips. The reasoning of the Court of Appeals is to the effect that since the act imposed upon respondent the obligation to pay wages, the service rendered by the redcaps was rendered by respondent; that tips given to the redcaps were not gifts, but compensation for service, and that since the service was rendered by defendant, the tips belonged to the defendant. The trouble with this reasoning is that respondent imposed no charge for the service and prohibited the redcaps from soliciting tips, passengers were under no obligation to pay for the service, and the consideration of the moral obligation of the passengers based upon the supposed understanding that what they paid "was the meat and bread of the redcap" is clearly immaterial in view of the obligation of respondent under the act to pay the wages which Congress had determined to be the minimum necessary to enable the redcaps to buy their "meat and bread." Petitioner submits, therefore, that the ruling of the Court of Appeals in this case and in the Williams case, which attributes to the act the legal effect of changing the ownership of tips from the redcaps to respondent is not sound. If this is so, then the decision of the Court of Appeals must fall because it is based entirely on the proposition that the effect of the act was to vest absolute ownership of tips in the defendant without any agreement on the part of the redcaps.

III.

Under the Arrangement Existing When Respondent's Notice of October 22, 1938, Was Served on the Redcaps, They Had the Right to Retain All Tips Received. This Arrangement Was Never Changed Despite Respondent's Notice.

(a) **Because the Redcaps did not accept the plan, but on the contrary, protested against it, and the parties by their conduct thereafter recognized that there had never been a meeting of the minds thereon.**

Although the opinion of the Circuit Court of Appeals is based on the proposition that by force of the Fair Labor Standards Act itself, the redcaps' tips became the absolute property of respondent, so that the Court apparently did not find it necessary to discuss the question as to whether any agreement was or could be made between the redcaps and respondent affecting the ownership of tips, nevertheless in view of the Court's statement in the Jacksonville Terminal case that "the notice given the redcaps was sufficient to make his receipts the money of the employer" (118 F. [2] 326), we deem it necessary to state briefly why we believe the Court erred in so holding.

If the tips, absent any agreement to the contrary, were the property of the redcaps, as petitioner contends, and if the Fair Labor Standards Act did not effect any change in this ownership, then obviously some agreement between respondent and the redcaps was necessary to vest the ownership of the tips in respondent, so that the retention of these tips constituted payment of wages by defendant. Petitioner contends that in view of the protest made by the redcaps by their duly designated representative two days after receipt of respondent's notice of October 22, 1938, and the other facts and circumstances showing that

there was never any meeting of the minds of the redcaps and respondent on the terms of the notice, the notice was ineffectual to make any change in the existing arrangement under which the tips were the property of the redcaps. For the sake of brevity petitioner will not elaborate on this contention, as the point is well covered in the opinion of Judge Atwell (R. 286-288), 33 F. Supp., l. c. 247, 248.

(b) **Because respondent could not by its unilateral action effect a change in the arrangement in view of the redcaps' previous designation of a representative for collective bargaining purposes, and request for a conference to negotiate a collective agreement under the Railway Labor Act.**

In addition to the fact that there was no meeting of the minds of the parties on respondent's notice of October 22, 1938, so as to change the existing arrangement under which the redcaps had the right to retain their tips, petitioner contends that under Section 2 of the Railway Labor Act this notice was ineffectual to change the existing arrangement after the redcaps had organized; had by a majority vote selected and designated a bargaining representative; had so informed respondent, and had requested a conference for the purpose of making an agreement with respect to wages and working conditions. They so designated petitioner herein as their representative on October 11, 1938 (R. 139). On the same day petitioner requested a conference for the purpose of negotiating an agreement covering the working conditions of the redcaps (R. 142). This was eleven days before defendant's so-called accounting and guarantee notice was served on the individual redcaps by respondent. Under these circumstances it was the duty of respondent under the Railway Labor Act "to exert every reasonable effort to make * * *" an agreement

"covering rates of pay, rules and working conditions," and it was without authority to take unilateral action to prescribe wages and working conditions until such efforts as commanded by the Railway Labor Act had been made. Section 2 of the Railway Labor Act, upon which petitioner relies, U. S. C. A., Title 45, Section 152, provides:

> General duties. First. Duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents and employees **to exert every reasonable effort to make** and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and employees thereof.
>
> Second. Consideration of disputes by representatives. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, **in conference between representatives designated** and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute. (Emphasis added.)

In the Virginian Railway case this Court held squarely that it is the mandatory duty of a carrier employer to treat with the duly authorized representative of the employees for the purpose of making, if possible, a collectively bargained agreement. Virginian Railway Company v. System Federation, No. 40, 300 U. S. 515, 81 L. Ed. 789.

Unless the Railway Labor Act is without substance and meaning, it became the clear, plain and inescapable duty of respondent to "exert every reasonable effort" to make an agreement "concerning rates of pay, rules and working conditions." Instead of pursuing the course commanded by the law, it flouted the law and undertook by unilateral

declaration to prescribe the wages and working conditions. This it had no right to do for this plain reason: Implicit in the language prescribing the duty to exert every reasonable effort to negotiate an agreement with respect to wages and working conditions, is the denial of the right of the carrier-employer to fix them by unilateral declaration. This must be so if the Railway Labor Act is to accomplish its purposes. Such acts as respondent was guilty of in this case are the very things which through the years engendered and brought on labor controversies resulting in strikes and in the interruption of commerce, and which provided the reason and factual support for the Railway Labor Act. There was a day when the carrier could by its own fiat dictate wages and working conditions without negotiating with employees, but that day ended with the enactment of the Railway Labor Act.

The redcaps were likewise, by command of the Railway Labor Act, under the obligation to exert every reasonable effort to make an agreement by negotiation with respondent. They were commanded when wages and working conditions were to be considered, or a dispute arose, to stick to their posts and permit the stream of commerce to flow, and negotiate. When respondent served its notice (instead of pursuing the course commanded by the law), the redcaps turned the whole matter over to petitioner, their previously authorized representative, and replied through him, thus asserting their willingness and readiness to deal through him as their collective bargaining agent. Petitioner protested the action of respondent on October 24, 1938 (R. 128). This left the action of the employer unagreed to. There was, as Judge Atwell found, no meeting of the minds.

The situation then was in this posture: The employees stood ready and willing to negotiate—urging negotiations,

in fact. Respondent stood on its unilateral declaration and failed to make any reasonable effort to make an agreement.

The employees continued in their jobs, as it was their duty to do, all the while keeping their protest alive and likewise their readiness and willingness to negotiate. They preserved peace in the industry by complying with the demand of the employer for reports of tips received. They accepted payment of part of their wages from their employer, to which they were clearly entitled under the law. Meanwhile, as we have said, they kept their protests and invitation to negotiate alive. There is nothing in all this which can be construed into an acceptance of the notice as binding on the employees.

The first six paragraphs of Section 2 of the Railway Labor Act (U. S. C. A., Title 45, Section 152) embodies provisions dealing with the **making** of agreements. They command every reasonable effort to **make** agreements. They safeguard the employees in organizing and selecting representatives. They proscribe attempts of the employers to influence or coerce employees in the exercise of these rights.

And here let us say that there could be few more effective ways for an employer to coerce employees into abandoning their organization or their representative than by committing such acts as respondent committed in this case. A carrier, when confronted with negotiations, could easily take such unilateral action as would place the employees at a great disadvantage in their efforts to bargain collectively. Under these circumstances, who can deny that it was the clear intent of the Railway Labor Act that wages and working conditions can be changed by an employer only after he has fully complied with the law, and has made every reasonable effort to make an agreement by negotiation with the duly authorized representative of the men?

The language of Mr. Justice Swayne, in Smythe v. Fiske, 23 Wall. 374, 380, 23 Law. Ed. 47, 49, is especially applicable here:

> "A thing may be within the letter of the statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law."

The intent of the lawmaker, as set forth in the first section of the Railway Labor Act, was to enact a law which would tend to prevent labor controversies and interruptions of commerce. With that intent in mind, who can say that it would not be sheer mockery to leave out of the law the denial of the right of an employer to fix wages and working conditions without first exerting every reasonable effort to make an agreement with respect to them by negotiation with the employees?

We submit that we have here conclusively established (a) there was no agreement between the employer and the employees to change the working arrangements existing at and prior to the enactment of the Fair Labor Standards Act, and (b) that the carrier-employer was without authority to change it by unilateral declaration without first exerting every reasonable effort to make an agreement, and that no such effort was made.

Under the arrangement existing, tips were considered by both the employees and the employer as the property of the employees, and no change was ever made in this arrangement in spite of respondent's notice.

IV.

Respondent by Its Notice of October 22, 1938, Did Not Claim Ownership of the Redcaps' Tips. The Notice Was Merely an Assertion by Respondent of Its Opinion That Tips Were Wages Under the Fair Labor Standards Act, and That It Was Only Bound to Make up the Difference Between the Tips Received and the Minimum Wages Earned.

The Circuit Court of Appeals in the Jacksonville Terminal case, followed in the case at bar, held that respondent's notice to the redcaps was sufficient to make the tips received by them the money of respondent. We submit that a careful analysis of the notice (R. 127) does not support this statement.

In substance this notice simply amounts to a statement by defendant which might be phrased as follows:

> "Under the Fair Labor Standards Act we are required to pay you a minimum wage. This wage will be paid you by passengers who give you tips. You will inform us as to the amount of these tips, and if the passengers do not pay you sufficient tips to secure the minimum wage, we will pay you the difference,"

or perhaps it might be stated as follows:

> "You are privileged to retain your tips as you have always done, but with this difference: We will credit the amount of said tips against the minimum wage which the law requires us to pay you, and if you do not receive sufficient tips to secure the minimum wage, we will make up the difference."

There is nothing in the notice stating that the men must turn over their tips. On the contrary, the notice specifically states that the men are privileged to retain their tips. The only limitation, in effect, sought to be made on this privilege was that the men must consider these tips as

part payment of wages so that the defendant would only have to make up the difference between the tips and the minimum wage. Thus, in the final analysis, the accounting and guarantee arrangement devised by the railroads to evade their liability under the Fair Labor Standards Act is an attempt by them to write into the act a provision under which tips received from passengers are to be considered as wages paid by the railroads. Respondent, of course, will say that this is not its effect, contending that the arrangement provides for the turning over of tips by the men to the amount of the minimum wage. The notice does not, however, as we have pointed out, so provide. Stated briefly, the notice is to the effect that "the carrier * * * guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided (that is, as tips) will not be less than the minimum wage provided by law," and that the men are "privileged to retain, subject to their being credited on such guarantee, all such tips or remuneration * * * except such portion thereof as may be required * * * for taxes." There is not a single word in the notice about the men turning over their tips. The notice merely stated that the carrier guarantees that the amount of tips reported, plus the sum paid by the defendant, will not be less than the minimum wage. In other words, defendant was merely expressing its opinion and belief that tips are wages which could be considered as received in partial discharge of the minimum wage required to be paid by the act.

V.

The Accounting and Guarantee Plan Is Not a Compliance With the Fair Labor Standards Act, Because It Does Not Carry Out the Purposes of Congress Since (A) It Permits of Easy Evasion of the Obligations Imposed Thereby, (B) It Shifts the Burden of Keeping Records From the Employer to the Employee in Violation of Section 11 (c) of the Act, and (C) It Is Conducive to Labor Disputes Burdening and Obstructing Commerce.

Petitioner further contends that even if the accounting and guarantee plan did become a part of the employment contract of the redcaps, nevertheless the plan was not a compliance with the Fair Labor Standards Act, because it will not carry out the purposes of the act as expressed by Congress in section 2 thereof (U. S. C. A., Title 29, Section 202). On the contrary, the purposes of the act will be defeated if the accounting and guarantee plan is held to be a compliance with the act.

Section 11 (c) of the Fair Labor Standards Act [U. S. C. A., Title 29, Section 211 (c)] requires every employer subject to the act to make and keep such records of the persons employed by him and of the wages, hours and other conditions and practices of employment maintained by him as may be necessary or appropriate for the enforcement of the provisions of the act.

The so-called accounting and guarantee system is subject to serious abuse, a factor which is properly considered in determining whether Congress intended that such system might fulfill the statutory purpose. The records which the employer is required to make and preserve under section 11 (c) of the act are essential in order to determine whether the act is being violated. Respondent required the redcaps to report the tips received by them and adopted and relied upon such reports in determining whether it owed

the redcaps anything on account of its guarantee. Under such a plan no provision was made for determining how much the employees actually received in tips. The redcap can report without effective check by the administrator or the employer the receipt of any sum whatsoever. If he feels it necessary to report the receipt of tips equal to or nearly equal to the minimum wage because of the fear that he may otherwise lose his job as an inefficient employee, he can do so, even though he received much less. This scheme, therefore, permits easy evasion of the minimum wage provisions of the act, and the provisions requiring that true and accurate wage records be made and kept.

The record shows (R. 131) that respondent only required the redcaps to report their tips from October 24, 1938, through February 28, 1939, and that they did not report their tips from March 1, 1939, through October 15, 1939. They again reported their tips from October 16, 1939, through March 6, 1940. During the period from March 1, 1939, through October 15, 1939, respondent kept no records whatsoever of the amount of tips received by the redcaps, and clearly violated the record-keeping requirements of the act. This violation is not, of course, directly involved in this suit, but it does illustrate the light-hearted manner in which respondent treated its obligation under the act, and the fact that the accounting and guarantee plan is an entirely inadequate substitute for the mandatory provisions of the act that **every employer shall pay wages.** Even if the accounting and guarantee plan is a compliance with the act, respondent could not carry out the terms thereof unless the redcaps reported daily the amount of their tips.

The purpose of Congress to prevent labor disputes burdening and obstructing commerce, and the free flow of goods in commerce, intended to be carried out by the requirement that the employer pay a decent minimum wage

to his employees, is not effectuated by the accounting and guarantee plan. In fact, it is obvious that this plan is apt to lead to serious labor disputes and to dissatisfaction on the part of those employees who are working under the plan. The dissatisfaction of the redcaps with this system is evidenced by the filing of this suit and other similar suits to which we have referred. A redcap who fails to earn the minimum per hour in tips becomes an unnecessary expense to his employer, and the employer can, for legitimate business reasons, discharge him. Redcaps who are unable to produce, and are fearful of probable discharge, will in all likelihood falsify their reports to indicate an income of at least the minimum per hour. This will create a situation which encourages dishonesty, and at the same time contravenes the fundamental provisions of the act in that such a man will be forced to subsist upon less than the minimum prescribed by the act. It will only be natural for the railroads to check up on the men and spy on them if they report a smaller amount in tips than the minimum wage. This will engender suspicion, bitterness and strife, and a system of checking, or even espionage will be inaugurated. The act will thus increase rather than decrease conditions which are detrimental to the "general well-being" of the redcap, and will lead to "labor disputes burdening and obstructing commerce, and the free flow of goods in commerce."

We submit that it is evident that Congress could not have had in mind permitting any such arrangement as the accounting and guarantee plan devised by the railroads to evade the duty imposed upon them by the act to pay their employees wages. The law is plain; it says every employer shall pay each of his employees who is engaged in commerce wages at the minimum rates, and, since it is plain, there is no occasion for construction. United States v. Missouri Pacific Railroad Company, 49 Sup. Ct. 133, 278

U. S. 269, 72 L. Ed. 322; Russell Motor Car Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778; Albert and J. M. Anderson Manufacturing Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778. Since Congress has said that a payment of wages by the employer shall be the means of effectuating the purposes of the act rather than some other method which might to the Court in a particular case appear just as good, no employer and no court may substitute its judgment for that of Congress.

VI.

Tips Received by the Redcaps Were Not Payment of Wages by Respondent as Required by the Fair Labor Standards Act. The Judgment of the Circuit Court of Appeals Reversing the Judgment of the District Court in Favor of the Redcaps Is, Therefore, Erroneous.

If petitioner is correct in his assertion that the tips received by the redcaps during the period here involved were their property, and did not become the property of respondent by virtue of the Fair Labor Standards Act, or by any agreement between the redcaps and respondent, the question remaining is whether the tips received from passengers were, even though the redcaps' property, payment of wages under the act. Since the Circuit Court of Appeals did not base its decision on the ground that tips were wages, but rather on the ground that the tips were the property of the respondent which could be used for the payment of wages, we will not lengthen this brief by a further discussion of this point since we believe this question has been definitely answered in the negative by Judge Atwell in this case (R. 290), and by Judge Otis in the case of Harrison v. Kansas City Terminal Railway Company, 36 F. Supp. 434, l. c. 437.

Petitioner, therefore, respectfully submits that the tips were the property of the redcaps; that no change in the ownership of the tips was made by defendant's notice of October 22, 1938, or by the Fair Labor Standards Act; that tips given by passengers to redcaps are not payment of wages by respondent, and that consequently, petitioner is entitled to recover, and he, therefore, prays that this Court issue its writ of certiorari so that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

CHAS. M. HAY and
S. D. FLANAGAN,
Attorneys for Petitioner.

May, 1941.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	3
Argument	7
Conclusion	14
Appendix A	15
Appendix B	17

CITATIONS

Cases:	
Ex parte No. 72 (Sub.-No. 1), 229 I. C. C. 410	8
Fleming v. *Cincinnati Union Terminal Co. Inc.* (S. D. Ohio), reversed and remanded by C. C. A. 6th, 117 F. (2d) 1012	9
Fleming v. *The Cleveland Union Terminal Co.* (N. D. Ohio)	9
Harrison v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434	9
Polites v. *Barlin*, 149 Ky. 376, 149 S. W. 828	12
Townsend v. *New York Central Railroad Co.* (N. D. Ill. E. D.)	9
Williams v. *Jacksonville Terminal Co.*, 118 F. (2d) 324	7, 9, 11
Zappas v. *Roumeliote*, 156 Iowa 709, 137 N. W. 935	12
Statutes:	
Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Supp. V, § 201 *et seq.*:	
Sec. 3	12, 15
Sec. 6	3, 12, 13, 15
Sec. 16	3, 6, 9, 16
Sec. 17	9
Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 902 (13)	12
Railroad Retirement Act, 45 U. S. C. § 228a (h)	12
Miscellaneous:	
American Law Institute, *Restatement of the Law of Agency*, pp. 871–872	12
87 Cong. Rec. (advance sheets), No. 91, p. 4209	10
Report of the Administrator of the Wage and Hour Division on Senate Resolution 325	17
S. Rep. 260, 77th Cong., 1st sess	8
S. Res. 105	10
S. Res. 325	8

318280—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1023

A. J. PICKETT, GENERAL CHAIRMAN OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, DULY AUTHORIZED REPRESENTATIVE OF JAMES FOSTER AND OTHERS, PETITIONER

v.

THE UNION TERMINAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Administrator of the Wage and Hour Division of the United States Department of Labor is charged with the responsibility and duty of administering and enforcing the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat.

1060, 29 U. S. C., Supp. V, § 201 *et seq.*). The petition for a writ of certiorari in this case presents questions of interpretation and rights and liabilities under the Act which are of public interest and importance. Accordingly, the Administrator submits this memorandum, as *amicus curiae*, to urge that the petition for a writ of certiorari be granted.

OPINIONS BELOW

The written opinion of the District Court (R. 281–290) is reported in 33 F. Supp. 244; the oral opinion, findings of fact, and conclusions of law of the District Court (R. 276–281) are not reported. The opinions of the Circuit Court of Appeals (R. 301–303) are reported in 118 F. (2d) 328.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 4, 1941 (R. 304). A petition for a rehearing was filed on March 24, 1941 (R. 305), and was denied on April 2, 1941 (R. 310). The petition for a writ of certiorari was filed on May 5, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Immediately prior to the effective date of the Fair Labor Standards Act, respondent Terminal Company inaugurated the so-called "accounting and guarantee" system of compensating its Red Cap porter employees for their services. Under

this system, each Red Cap was required to report daily to the Terminal Company the amount of tips received by him from passengers, and the Terminal Company paid to the Red Cap only the difference, if any, between the amount so reported and the minimum wage provided by the Act. The question is whether the Terminal Company, through the adoption of this system, complied with its obligation under Section 6 of the Act to pay to its employees a specified minimum wage.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Supp. V, § 201 *et seq.*, appear in Appendix A, *infra*, pp. 15–16.

STATEMENT

This suit was instituted under Section 16 (b) of the Fair Labor Standards Act by a duly designated representative of certain Red Cap porter employees (hereinafter called "Red Caps") of the respondent, The Union Terminal Company (hereinafter called "Terminal Company"), to recover the amount of unpaid minimum wages alleged to be due to the Red Caps from the Terminal Company under the provisions of Section 6 of the Act, for the period from October 24, 1938, through March 6, 1940, together with liquidated damages and a reasonable attorney's fee (R. 22–38). The case was tried on an agreed statement of facts (R. 118–196, 215–274) and testimony (R. 196–212).

The pertinent facts may be summarized as follows:

On October 22, 1938, the Terminal Company served on each Red Cap employed by it the following letter (R. 127–128):

> DALLAS, TEXAS, *October 22, 1938.*
>
> To: Red Caps, The Union Terminal Company.
>
> In view of the requirements of the Fair Labor Standards Acts, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amount received by you as tips or remuneration for such services.
>
> The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.
>
> You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.
>
> All the matters above referred to are subject to the right of the carrier to determine from time to time the number and

identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required.

THE UNION TERMINAL COMPANY,
By MURRELL L. BUCKNER,
Vice-President & Gen. Manager.

Although the Red Caps promptly protested the terms of this notice by their duly authorized representative (R. 128–130), the system of compensation outlined in the notice was put into effect. For the period from October 24, 1938, to February 28, 1939, each Red Cap was required to file daily time slips, showing the hours worked and the tips collected during the day. For the period from March 1, 1939, to October 15, 1939, the Red Caps were required to report only the hours worked each day; unless reported to the contrary, the Terminal Company assumed that each Red Cap collected in tips an amount equivalent to the number of hours worked by him multiplied by 25 cents, the hourly minimum wage. During this period from March 1, 1939, to October 15, 1939, each Red Cap collected in tips during each work period an amount equal to or in excess of the minimum wage. During the period from October 16, 1939, through March 6, 1940, the Company reverted to the system of having the Red Caps make daily reports of both tips collected and hours worked (R. 130–131).

During the entire period covered by the complaint, October 24, 1938 to March 6, 1940, the Terminal Company stood ready to and did pay to each Red Cap, for each work period during which the amount of tips collected by the Red Cap amounted to less than the minimum wage, an amount equal to the difference between the tips collected and the minimum wage (R. 131–132).[1] The total minimum wages to which the Red Caps were entitled under the Act during this period amounted to $40,960.83. Of this amount, the total actually received by the Red Caps directly from the Terminal Company amounted to only $2,333.84. The remainder, $38,626.99, was received by the Red Caps from passengers in the form of tips (R. 29–37, 124).

The District Court held that the tips received by the Red Caps from passengers did not constitute wages paid to them by the Terminal Company (R. 286, 289, 290). Accordingly, it rendered judgment for the petitioner in the sum of $77,753.98, representing unpaid wages of $38,626.99, an equal amount as liquidated damages, and $500 as an attorney's fee, all as provided by Section 16 (b) of the Act (R. 39–41). The Circuit Court of Appeals reversed (R. 302, 304).

---

[1] During the period from October 24, 1938, through October 23, 1939, the hourly minimum wage for Red Caps under the Act was 25 cents. For the period from October 24, 1939, through March 6, 1940, the hourly minimum wage under the Act was 30 cents per hour.

ARGUMENT

The court below decided the present case on the authority of its decision in *Williams* v. *Jacksonville Terminal Co.*, 118 F. (2d) 324, with which the present case was argued. The rationale of decision in both cases is that, although tips received by Red Caps prior to the effective date of the Act were the property of the Red Caps, after the effective date of the Act, and by virtue of its provisions, the tips became the property of the Terminal Company. This result, the court below held, followed irrespective of whether the Red Caps agreed that the tips should be the property of the Terminal Company and irrespective of the intention of the passengers paying the tips. The court concluded that since the tip money was money of the Terminal Company, the Act was complied with when the Terminal Company allowed the Red Caps to keep their tips and paid to them any difference between the tips and the minimum wage.

1. This decision presents a question of substantial public importance in the interpretation of the Fair Labor Standards Act which has not been, but should be, decided by this Court. Ever since the effective date of the Act the situation of the Red Caps has been a matter of continuing administrative investigation and concern. The history of the problem is fully summarized in a report, dated November 30, 1940, from the Administrator of the Wage and Hour Division to Senator Thomas,

Chairman of the Senate Committee on Education and Labor, on Senate Resolution 325, 76th Congress, 3d Session. This report, which was made in response to a request by Senator Thomas and is part of the committee files on Senate Resolution 325 (see S. Rep. No. 260, 77th Cong., 1st Sess.), is printed as Appendix B to this brief, *infra*, pp. 17–30.

It appears from this report that the "accounting and guarantee" system which is involved in this case was put into effect, on and after the effective date of the Act, in practically all railroad stations in the United States.[2] From the beginning it was a source of dissatisfaction, and so many complaints were filed with the Administrator that investigations were begun at various terminals and a public hearing was held by the Administrator (see Appendix B, *infra*, pp. 18–21). The result has been collateral regulation of the "accounting and guarantee" system within the limited powers conferred upon the Administrator by the Act,[3] and the insti-

---

[2] According to the findings of the Interstate Commerce Commission, there are more than 4,000 Red Caps employed in cities having a population of over 100,000. See *Ex Parte No. 72* (Sub-No. 1), 229 I. C. C. 410, 411. Almost all of these Red Caps, as well as the several thousand employed in smaller communities, were subject to the "accounting and guarantee" system.

[3] See Notice of Hearing by the Administrator on records to be kept regarding Red Caps, published June 7, 1939, 4 F. R. 2306–2307; and amended regulations on records to be kept regarding Red Caps (fourth proviso), published on October 14, 1939, 4 F. R. 4252.

tution by the Administrator of two actions under Section 17 of the Act.[4] In addition, numerous civil actions, similar to the present one, have been instituted by or on behalf of the Red Caps under Section 16 (b) of the Act.[5]

The question has also received the attention of Congress. During the Third Session of the

---

[4] In *Fleming* v. *Cincinnati Union Terminal Co., Inc.* (S. D. Ohio), the complaint charges the defendant with failure to pay the minimum wages and with keeping reports of tips received by Red Caps in amounts equal to the minimum wage, despite knowledge that the Red Caps received lesser sums. After issue was joined and depositions were taken and filed on behalf of the Administrator, defendant abandoned the accounting and guarantee system, and the District Court dismissed the complaint on the ground of mootness. This judgment was reversed by the Circuit Court of Appeals for the Sixth Circuit, 117 F. (2d) 1012, which remanded the case for trial. The case has not yet been tried.

In *Fleming* v. *The Cleveland Union Terminal Company* (N. D. Ohio) the complaint makes charges similar to those against the Cincinnati Terminal; issue has been joined and the case has been assigned for trial on June 16, 1941.

[5] Most of these cases are cited on pages 13 and 14 of the petition for a writ of certiorari in the case at bar. The United States intervened in *Harrison* v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434 (W. D. Mo.), to defend the constitutionality of the Act, but the court did not find it necessary to rule upon that issue. The Administrator filed briefs as *amicus curiae* in the present case and in the *Williams* case in the Circuit Court of Appeals for the Fifth Circuit, and in *Townsend* v. *New York Central Railroad Co.* (N. D. Ill., E. D.), which has been tried and is awaiting decision. The latter case also involves the question of whether the Red Caps reported the receipt of larger sums than they actually received as tips because threatened with discharge or other discrimination if they failed to do so.

Seventy-sixth Congress, Senator Thomas, Chairman of the Committee on Education and Labor, introduced Senate Resolution 325, which directed the Administrator to undertake an immediate inquiry into the wages, hours, and other conditions of employment of Red Caps in view of the minimum wage requirements of the Fair Labor Standards Act, and to report to the Senate the extent to which the letter and spirit of the Act is being violated, if at all, the extent of permissible regulation under the Act in its present form, and what legislation, if any, is needed for further regulation. Although no action was taken on this Resolution, a substantially identical resolution was introduced in the present session of Congress (S. Res. 105), was favorably reported to the Senate on May 5, 1941, by the Committee on Education and Labor (S. Rep. 260, 77th Cong., 1st Sess.), and was enacted by the Senate, with an amendment not here material, on May 15, 1941. 87 Cong. Rec. (advance sheets), No. 91, p. 4209.

In view of the long-continued administrative concern with the problem, the evident interest of Congress in its solution, and the large number of pending suits which involve the same issue as that here presented, the importance of a determinative decision of this case by this Court seems manifest.

2. The decision of the court below is, we believe, wrong as a matter of statutory interpretation, and the principle which it establishes—that tips given to employees may be made the property of the em-

ployer irrespective of consent by the employees and irrespective of the intention of the persons giving the tips—may be of wide application in other fields where the tipping of employees is customary.

The court below recognized in *Williams* v. *Jacksonville Terminal Co.,* 118 F. (2d) 324, upon the authority of which this case was decided, that prior to the effective date of the Act, tips received by the Red Caps belonged to them and not to the Terminal Company. But it held that the Act operated to change ownership of the tips, irrespective of the consent of the Red Caps. This conclusion we believe to be unsound. There is no provision in the Act which purports, or which by necessary operation serves, to deprive any employee of property which he would otherwise own. If tips were the property of the Red Caps before the Act, the Act alone could not make them the property of the Terminal Company.

The court below relied on the fact that the Act imposed on the Terminal Company a duty to pay for services rendered and that the tips received by the Red Caps were compensation for those very services. But the duty imposed by the Act upon the Terminal Company to pay wages to the Red Caps is not discharged by permitting the Red Caps to retain the tips they receive from passengers unless the tips are the property of the Terminal Company. And the mere assertion of ownership by the Terminal Company does not make the tips its property, where the passenger intends the

tip to be the property of the Red Cap and where the Red Cap does not consent that the tip shall belong to his employer.[6]

The Act itself lends no support to the view that an employer is legally entitled to the ownership of tips received by his employees and may treat such tips as wages for the purpose of Section 6. As the District Court observed (R. 290), the Congress was familiar with the practice of tipping and in several statutes had specifically dealt with that problem.[7] Yet when it came to prescribing in Section 3 (m) of the Act the items for which the employer could claim credit in computing wages, no mention was made of tips.

We believe it plain, then, that apart from an agreement between the Red Caps and the Terminal Company—and the court below disposed of the case on the assumption that there was no agreement on the accounting and guarantee system because of the prompt protest by the Red Caps—the tips given to the Red Caps were their property and never became the property of the

---

[6] In occupations where tipping is customary, the gratuities received by an employee from patrons of the employer have been held to be the property of the employee, not of the employer. *Polites* v. *Barlin*, 149 Ky. 376, 149 S. W. 828; *Zappas* v. *Roumeliote*, 156 Iowa 709, 137 N. W. 935; see also American Law Institute, *Restatement of the Law of Agency*, pp. 871–872.

[7] See Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 902 (13); Railroad Retirement Act, 45 U. S. C. § 228a (h).

Terminal Company. If this be so, it follows that the action of the Terminal Company in allowing the Red Caps to keep their property did not constitute the payment of wages within the meaning of Section 6 of the Act.

The same conclusion follows even if it be held that the conduct of the Red Caps in continuing their employment subsequent to the Terminal Company's notice of October 22, 1938, resulted in an agreement by the Red Caps to the terms of the "accounting and guarantee" system.[8] That agreement could not prevent the tips, when given, from becoming the property of the Red Caps in the first instance, for the passengers who gave the tips were not made aware of the agreement and consequently still intended their gratuities to belong to the Red Caps. Accordingly, when given to the Red Caps, the tip money became their property, even though they were under a contractual obligation to account to the Terminal Company for the amount received. Compare the decisions cited in note 6, *supra*. Since the tips became the property of the Red Caps when given, the accounting and guarantee system amounted at most to an agreement whereby the

[8] One of the other important issues in this case is whether, in view of the provisions of the Railway Labor Act, a carrier may unilaterally and without conference with the representative of its employees change the terms of employment, and whether, if it does so, the employees' continuance at work under protest and failure to strike can be deemed an acceptance of the new terms of employment.

Red Caps turned over some of their own property to their employer and received that property back from the employer as "wages." This is not, we submit, a compliance with the Act. The Act requires the actual payment of the minimum wage, not an agreement that the employer will pay the minimum wage provided that the employee gives to the employer, not only his services, but some of his property as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

RICHARD H. DEMUTH,
Special Assistant to the Attorney General.

GERALD D. REILLY, *Solicitor,*
C. E. RHETTS, *Associate Solicitor,*
IRVING J. LEVY, *Assistant Solicitor,*
JOHN E. SKILLING, *Attorney,*
United States Department of Labor.

APPENDIX A

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Supp. V., § 201 *et seq.*

SEC. 3. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods

318280—41——2

for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

* * * * *

SEC. 16. * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

APPENDIX B

Report of the Administrator on Senate Resolution 325:

NOVEMBER 30, 1940.

Honorable ELBERT D. THOMAS,
Chairman, Committee on
Education and Labor,
United States Senate, Washington, D. C.

DEAR SENATOR THOMAS: In response to your letter dated October 19, 1940, I have considered and am pleased to submit my report on S. Res. 325, now pending before the Education and Labor Committee.

As I advised you in my letter of October 31, 1940, the Wage and Hour Division was currently making an investigation in the matter of the wages and other conditions and practices of employment of red caps at the Grand Central Terminal in New York City and at the Washington Terminal Company, of this city. Preliminary findings of the inspectors in charge of these investigations, together with experience accumulated by the division in dealing with the matter in other respects since October 24, 1938, lead me to recommend that S. Res. 325 be adopted.

As is indicated in the preamble to the resolution, the wages and other conditions and practices of the employment of red caps have been a matter of continuing administrative investigation and concern since the effective date of the act, October 24, 1938. It is common knowledge, and, indeed, a matter

of administrative finding upon investigation, that prior to the effective date of the act the majority of red caps employed at railroad terminals were compensated for their services solely by tips or gratuities given them by the traveling public. At or about the time of the effective date of the act, the railroads conceived and put into effect a so-called accounting and guarantee system of compensating red caps, in view of the minimum wage requirement of the act. Under this system each company purported to guarantee the payment to each of its red caps of any additional sum required to bring the red cap's compensation by tips up to the minimum wage prescribed in the Fair Labor Standards Act. The red cap was "permitted" to retain possession of the tips, but was required to report daily the amount of tips received. This was the "accounting" aspect of the system and served to determine the company's liability, if any, on its "guarantee." As far as we know, notification of the public by the companies of the inauguration of the accounting and guarantee system was the exception and not the rule. On the other hand, each company manifested a high degree of care and diligence in notifying each red cap of the inauguration of the system, and the diligence of the companies in this respect appears to have been matched by an equal degree of diligence on the part of red caps and their union representatives who promptly protested to the companies' officials that they did not approve the system because they thought it violated the minimum wage requirements of the Fair Labor Standards Act.

Shortly after the inauguration of the system by the companies, a group of lawyers representing the railroad companies and

individuals representing the red caps solicited an opinion of the Administrator whether the accounting and guarantee system was legal under the act. The union representatives claimed that the system was imposed upon the red caps over their protest and already was forcing them, through fear of loss of their jobs, into the practice of reporting to the companies the receipts of tips equal to the minimum wage even though such receipts actually were less than the minimum wage. The purpose of such reporting it was claimed was to relieve the company of any liability on its "guarantee," and thereby keep their jobs. Because at that time limitations upon personnel and administrative funds made it impossible for the Administrator promptly to investigate these claims, the Administrator (Elmer F. Andrews) wisely refrained from indicating his opinion with respect to the system which, hypothetically presented, failed to show adequate safeguards against the practices which the union officials alleged to exist in fact.

Notwithstanding the failure by the legal representatives of the railroads to obtain an opinion of the Administrator concerning the legality of the system under the act, and notwithstanding widespread dissatisfaction of the red caps with the system as evidenced to the Administrator by numerous written complaints filed with him by the red caps, the railroads continued to operate under the system.

By June 1939 so many complaints had been received by the Administrator that the accounting practice under the system was producing inaccurate if not false records kept by the companies for purposes of the act, that the Administrator duly published a notice of a public hearing to be conducted

before his designated representative to determine what if any amendment should be made to the Administrator's record keeping regulations to provide specially for records to be kept by employers of red caps. The hearing was held on June 27 and 28, 1939 and the presiding officer's findings and recommendations were published on October 14, 1939. Much of the evidence produced at the hearing tended to bear out the representations originally made to the Administrator by the Union representatives that the system was being fraudulently operated, both in the "accounting" and the "guarantee" practices. The presiding officer found on all the evidence that there could be no conclusion other than that the pay roll records of the carriers for red caps generally did not accurately record the data as to the wages paid. He also expressed grave legal doubt as to the validity of the system under the act. A copy of these findings and recommendations is enclosed for your perusal. Also enclosed is a copy of the amendment to the Administrator's record keeping regulations providing for additional records to be kept by employers of employees engaged in tipping occupations, such as red caps.

Shortly before the above-mentioned public hearing in June 1939, the Administrator designated representatives of the division to investigate complaints received from red caps employed at the Cincinnati Union Terminal Company and, as indicated in the preamble to S. Res. 325, upon finding evidence of flagrant violations of the minimum wage and record keeping provisions of the act, the Administrator caused a civil action to be instituted against the company under section 17 of the act to restrain such violations. The company in its answer joined issue as to the

Administrator's allegations, but when served by counsel for the Administrator with a trial notice it publicly announced the abandonment of the accounting and guarantee system and the simultaneous inauguration of a new plan whereunder, commencing February 1, 1940, red caps were to be regarded as employees of the company and to be paid wages at the minimum rate required by the act, but were also to be required to collect from each passenger and pay to the company the proceeds of a charge of 10 cents for each bag or parcel carried. The attorneys for the company immediately insisted that such action made the Administrator's proceeding moot, and the District Court of the United States for the Southern District of Ohio, in which the proceeding was pending, agreed and entered judgment dismissing the Administrator's action. The Administrator promptly took an appeal from this judgment to the United States Circuit Court of Appeals for the Sixth Circuit where the matter is now pending. It is significant that, subsequent to the judgment of the district court, the new plan inaugurated by the Cincinnati Company was gradually adopted at other terminal companies throughout the country.

At this point it is appropriate to mention the fact that after the Administrator filed suit against the Cincinnati Company, as above stated, red caps employed previously under the accounting and guarantee system instituted or caused to be instituted in various district courts of the United States, fifteen or more suits under section 16 (b) of the act to recover unpaid minimum wages, liquidated damages and reasonable attorney's fees under section 16 (b) of the act. In only two of these cases have judgments

been entered. In *Pickett* v. *Union Terminal Company,* 33 F. Supp. 244 (U. S. D. C. N. D. Tex.) the court entered judgment on May 28, 1940 for $38,626.99 plus liquidated damages in an equal sum, together with an attorney's fee and costs of the proceeding. The court held that since the red caps had promptly protested the inauguration of the accounting and guarantee system on October 24, 1938, there was no contract under which the tips received by the red caps from passengers became the property of the company, and therefore that the tips did not become wages paid by the company to the red caps as required by the act. The defendant company has taken an appeal to the United States Circuit Court of Appeals for the Fifth Circuit where the matter is now pending. In a similar suit, *Williams* v. *Jacksonville Terminal Company* (the case has not yet been reported), the District Court of the United States for the Southern District of Florida, Jacksonville Division, held that the red caps were not employees of the company, but that even if they were the tips were wages within the meaning of the act, and accordingly, the court, on October 21, 1940, gave summary judgment in favor of the defendant company. We have been advised that the plaintiff in this case is taking an appeal to the United States Circuit Court of Appeals for the Fifth Circuit and that that court has indicated that the appeal will be heard together with the appeal in the *Pickett* case. A brief on behalf of the Administrator as *amicus curiae* has been filed with the court in the *Pickett* appeal, and the position of the Administrator therein set forth is that tips reported under the accounting and guarantee system were not wages paid them by the company within the meaning of the act.

Copies of this brief are enclosed for your perusal. It is not unlikely that a supplementary brief will be filed on behalf of the Administrator in conjunction with the appeal in the *Williams* case.

Returning now to the new plan of employment of red caps since February 1, 1940, it appears that while considerable publicity was given by each company to its inauguration of the new plan, the fact that the 10 cents per bag or parcel collected by the red caps was to be paid over to the company, was not made clear. In some instances it was not even mentioned, and for a while it further appears that numerous passengers assumed that in addition to the minimum wage the red cap was getting the benefit of the 10 cent charges collected. Moreover, at least some of the publicity given the new plan by the companies made it appear that the Fair Labor Standards Act and the Administrator of the Wage and Hour Division forced the railroads to adopt such a system. The attached copy of General Hugh S. Johnson's column, published in various newspapers on or about September 19, 1940, referred to the system as regimentation "by the wages and hour administration." In view of the inaccuracies upon which General Johnson relied, I sent him a letter, a copy of which is enclosed, in which I undertook to correct General Johnson's understanding of the problem as well as that of his readers. Excerpts from this letter were published by General Johnson in his column a day or so later.

In numerous other instances newspapers have featured the "plight" of the red caps under the new plan. Moreover, a large volume of inquiries, petitions, resolutions, etc., have been forwarded by individuals and organizations to the White House, members of

Congress, and heads of various federal agencies, all for a common purpose, namely, to secure federal participation in finding a more satisfactory solution of the problem than has been provided by the systems employed by the railroad companies. While the Administrator has undertaken to the extent in keeping with his statutory authority to answer these communications, it is believed that the adoption of S. Res. 325 will enable him to be more responsive to the public interest therein manifest.

It is clear that neither the Fair Labor Standards Act nor any other federal law or regulation that I know of requires the railroads to adopt or continue the present plan; the Wage and Hour Division certainly never suggested it, has not endorsed it, and does not require it. Indeed, I am advised that a passenger filed a sworn complaint with the Interstate Commerce Commission several months ago charging that the Cincinnati Union Terminal Company, under the plan which it inaugurated February 1, 1940, has violated several provisions of the Interstate Commerce Act, and that the Interstate Commerce Commission conducted a public hearing with respect to such complaint and will in due course reach a decision with respect thereto. I mention this proceeding because under sub-paragraph (1) of S. Res. 325 I would be required to report to the Senate whether the new plan or practices violate the Fair Labor Standards Act "or other Federal statutes."

The preliminary findings upon recent investigations of the Grand Central Terminal in New York City and the Washington Terminal Company in this city may be summarized. On the one hand, there are indications of public dissatisfaction with the

new plan. Many passengers think that the cost of the railroad ticket should cover red cap service and that the 10 cent charge is in reality an involuntary tipping system which keeps the cost of the service on the public rather than the company. Further, many passengers complain that they no longer receive the "personalized" attention of the red cap as they did under the voluntary tipping system but instead receive a sort of mechanical attention which shows some signs of a "speed-up" system. For example, one red cap, by the use of a truck, may now undertake to carry the baggage of several passengers which, of course, inevitably entails slight delays due to comingling and some confusion of baggage, etc.

On the other hand, dissatisfaction of the red caps under the new plan is much more poignant. At the Washington Terminal the more industrious red cap complains that the incentive to him to give the best possible personalized service to the passenger has been very materially impaired. Regardless what his collections are from passengers for an eight-hour day, he is paid wages at the flat minimum rate, namely, $2.40. It has not been uncommon for numerous red caps to collect charges in sums ranging from $3 to $5 per day but they get no more wages for that day's work than the red caps who collected only $1 or $2 in charges. The red caps say that if they give particularly good service to a passenger it is possible that they may receive in addition to the regular charge a small tip which they are authorized to keep, but that in giving such particularly good service they do so at the expense of the day's volume of service to all passengers that come their way. Thus, it is better to give the mechanical speeded up service and

thereby "make" $2.40 or more for the day's work than it is to give more satisfactory service to a lesser number of passengers and thereby fall below a total of charges equal to $2.40. In other words, the few additional tips for special service do not offset the impression of the red cap's supervisors that his receipt of less than $2.40 is due to lack of industry or "efficiency" instead of painstaking efforts to please the patrons of the company.

At the Grand Central Terminal in New York the situation differs from the foregoing. There, by virtue of a collective bargaining agreement, a kind of bonus arrangement exists, in that each red cap is entitled to keep 8¼ cents of each 10 cent charge collected in excess of the sum of $2.90 which is arrived at by adding overhead expense at 50 cents per day to the minimum wage of $2.40. It seems clear that such an arrangement insures greater incentive to the red cap than the Washington system.

Not only has the Washington red cap's incentive to give the maximum service been seriously impaired, he has been further discouraged in the knowledge that the Washington Terminal Company has enjoyed a considerable profit under the new system. The company's records for a period of five and a half months indicate a gross annual profit to the company of approximately $50,000. Contrasted with this, the records of the Grand Central Terminal at New York indicate no profit, but rather, a small deficit.

Another circumstance disturbing to the red caps is the common feeling that they must collect from passengers sufficient charges to equal the minimum wage at least. The feeling is that if they fall below the minimum wage with any frequency they are

immediately suspected of "inefficiency." It does not appear that this feeling on the part of the red caps is illusory since the frequency of discipline (in a major terminal not here under discussion, discharges of such red caps were numerous) of the red caps by the company for minor infractions of the various rules governing their conduct has markedly increased, and most if not all of the red caps so disciplined fall in the category of those who do not consistently "make" $2.40 worth of charges each day. This may explain the so-called "speed-up" to make $2.40 a day regardless of the comfort or convenience of the public. The older and physically less able employees claim that the speed-up is a strenuous condition from their standpoint. Other employees who, though physically able to endure successfully the speed-up, find it difficult nevertheless to make $2.40 per day because of assignments to low revenue producing locations. For example, an employee who handles only incoming train passengers suffers a disadvantage when compared to a red cap who handles the outgoing as well as the incoming passengers.

The red caps complain of increased nervous strain and humiliation in the performance of their services. Dissatisfied passengers often "take it out" on the red caps. Some passengers refuse to allow tags to be attached to their baggage and refuse to pay for the tags. In such situations the red cap is obliged by regulation to take the passenger to the station master who they say always decides in favor of the passengers against the red caps without clearly absolving the red caps (when they have acted in strict conformity with company regulations) from the blame that the

passengers would place on them. In other situations passengers "walk off" without paying the charge, in which case a suspicion is aroused that the red cap has embezzled the charge and is lying about it. In many other situations the red cap is "spotted" by other employees of the company in any situation in which he may be alleged to have committed any infraction of the numerous regulations governing his conduct. Many complaints have been filed by such other employees, and it appears that the red caps do not always enjoy the benefit of confrontation by the complainant or accuser.

Another source of dissatisfaction to the red caps is the fact that other employees of the company, such as baggage room porters and cleaners (charwomen, etc.), whose occupations furnish little or no revenue to the company and whose labor is less strenuous are nevertheless paid wages at higher hourly rates. These employees have always been acknowledged to be employees of the company and as such have gained status and have accumulated benefits under the Railroad Retirement Act, whereas the red caps, until the company started to pay them regular wages under the new system, were not regarded as employees, and therefore had a questionable status and accumulated no benefits under the Railroad Retirement Act.

In Washington and New York the red caps complain that the cost of living is higher than in other metropolitan centers and that it is impossible for a red cap to maintain a family in decency and self-respect on $2.40 a day. Many of them claim that they need supplementary public relief but cannot get it because they are already

employed. In this connection it is pertinent to mention that the industry committee for the railroad industry, convened by the Administrator pursuant to section 8 of the act, has filed with the Administrator its report and recommendation that the minimum hourly rate of pay of employees of trunk line railroads be increased from 30 to 36 cents, which, if approved by the Administrator, will result in a wage of not less than $2.88 for an eight-hour day instead of $2.40, for red caps as well as other railroad employees.

Perhaps of most immediate concern to the Administrator of the Fair Labor Standards Act is the condition found in both terminals under discussion whereby the red caps are required to purchase uniforms made according to specifications of the company and maintain them by proper cleaning and mending, at their own expense. In the case of the Washington red caps who make the minimum wage only, a question arises whether this condition has not resulted in their having received less than the minimum wage, in violation of the act. Another condition found is that the red cap is required to make good any loss due to the losing of baggage, etc. Here again, the question arises whether a red cap who has been required to make good such loss has thereby been denied the minimum wage. At the New York terminal red caps are likewise required to bear the expense of uniforms but evidently they are not made liable for loss of baggage.

Should S. Res. 325 be adopted during the closing weeks of the 76th Congress, there would be an insufficient period of time within which the investigation directed therein could be conducted during the pres-

ent Congress. Accordingly, it is recommended that the resolution be amended to provide that the report of the Administrator required to be made under S. Res. 325 may be submitted to the President of the Senate not later than April 1, 1941.

In conclusion, it is appropriate for me to restate what I said at the beginning of this report, namely, that in view of the findings upon recent inspections of the Grand Central Terminal and the Washington Union Terminal, together with experience accumulated by the division in dealing with the matter generally since the effective date of the act, it is my judgment that the public interest will be best served by the adoption of S. Res. 325, and I accordingly recommend that the same be adopted, with the amendment suggested in the preceding paragraph.

The Bureau of the Budget has advised that it has no objection to the submission of this report.

Sincerely yours,

(Sgd.) PHILIP B. FLEMING,
Administrator.

Enclosures (5)

(Set of enclosures sent with both original and tissue copy.)

164244
163262

U. S. GOVERNMENT PRINTING OFFICE: 1941